FILED
APR 5 19
HAROLD B. WILLEY

No. 822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

THE MARTIN BROTHERS BOX COMPANY, a corporation,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE L. QUINN, JR.
815-15th Street, N. W.
Washington 5, D. C.

IRVING RAND,
DONALD A. SCHAFER
Public Service Building
Portland 4, Oregon
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Page

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit 1

Opinions Below 2

Statement of Jurisdiction 2

Question Presented 2

Statutes Involved 3

Statement 4

Reasons for Granting the Writ 5

Conclusion 8

Appendix 1a

Opinion of the District Court 1a-25a

Motion of the Martin Bros. Box Co. to Dismiss .. 25a-28a

Notice from Court of Appeals of Entry of Order Denying Motion to Dismiss Appeal 29a

CITATIONS

Case

United States v. Interstate Commerce Commission, 337 U.S. 426 7

STATUTES

Title 28 U.S.C.

Sec. 1253 ..... 3, 6, 7, 29a
Sec. 1291 ..... 3, 6, 30a
Sec. 1336 ..... 3, 5, 30a
Sec. 2321 ..... 3, 5, 6, 30a
Sec. 2322 ..... 3, 5, 6, 30a
Sec. 2323 ..... 3, 5, 6, 30a
Sec. 2324 ..... 3, 5, 6, 31a
Sec. 2325 ..... 3, 5, 6, 31a

Title 49 U.S.C.

Sec. 1(4)(11) 3, 8, 31a, 32a
Sec. 3(1) 3, 8, 32a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

THE MARTIN BROTHERS BOX COMPANY, a corporation, *Petitioner,*

v.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Martin Brothers Box Company, a corporation, respectfully prays that a Writ of Certiorari issue to review the final order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Motion to Dismiss the appeal of the Interstate Commerce Commission and the Southern Pacific Company, a corporation, because said Court

was without jurisdiction over such appeal. The final order of the Court of Appeals denying Petitioner's Motion was entered on January 12, 1956. (App. 29a)

OPINIONS BELOW

The sole issue raised by this Petition is based on the order of the Court of Appeals of January 12, 1956, denying Petitioner's Motion to Dismiss the appeal for for want of jurisdiction (App. 29a), however, the following opinions are of record in the case:

The report of the Interstate Commerce Commission (R. 108-126) is reported in 280 I.C.C. 395.

The opinion of the United States District Court for the District of Oregon (R. 42-75) is reported in 128 F. Supp. 919. (App. 1a-25a)

The opinion, concurring opinion and dissenting opinion of the Court of Appeals (R 846-868) are reported in 219 F. 2d 811.

STATEMENT OF JURISDICTION

The final order of the Court of Appeals was entered January 12, 1956, (App. 29a) and the jurisdiction of the Supreme Court of the United States is invoked under 28 U.S. Code, § 1254 (1).

QUESTION PRESENTED

Is it within the jurisdiction of the United States Court of Appeals for the Ninth Circuit in this proceeding to entertain an appeal from the decision and judgment of the United States District Court for the District of Oregon to enjoin and set aside an order of the Interstate Commerce Commission, which order was made by the District Court for other than the payment of money or the collection of fines?

STATUTES INVOLVED

28 U.S. Code §§ 1253, 1291, 1336, and §§ 2321-2325 inclusive. 49 U.S. Code, § 1 (4) (11), and § 3 (1). (App. 29a-32a)

STATEMENT

On October 14, 1945, Petitioner, hereafter called Martin, filed a complaint with the Interstate Commerce Commission alleging that during the period, January 1 to September 30, 1947, the Southern Pacific Company, a corporation, operator of a railroad in interstate commerce, failed in its duty to provide and furnish complainant with an adequate or equal supply of freight cars for the transportation of its products from its Oakland, Oregon, plant to interstate destinations in violation of § 1 (4) (11) and § 3 (1) of the Interstate Commerce Act, 49 U.S.C.A. § 1 (4) (11) and § 3 (1). (App. 31a-32a) The relief asked was that the Commission enter an order commanding Southern Pacific to provide Martin with adequate and equal car service from Oakland, Oregon, to various destinations, and to pay Martin damages in the amount of $2,259,000.00 (R 77-81). Southern Pacific, in its answer, denied the material allegations of the complaint (R 81-83).

After hearing before a Commission Examiner, the Examiner made a Proposed Report to the effect that Southern Pacific Company had failed in its duty to furnish Martin adequate car service and that Martin had been damaged and was entitled to reparation in the sum of $135,220.56 with interest (R 83-106).

Upon exceptions to the Examiner's Report and after oral argument, the Commission, on March 12, 1951,

ordered Martin's complaint dismissed (R 107). Martin petitioned for reconsideration and its petition was denied by the Commission on July 30, 1951 (R 128).

Martin then filed a petition and an amended petition in the United States District Court for the District of Oregon naming the Commission and the United States of America as defendants. The petition asked that the Commission's order dismissing the complaint be enjoined and set aside as invalid (R 3-28). Southern Pacific Company was permitted to intervene in the action (R 35-36). The Commission, (R 28), the United States (R 31), and Southern Pacific Company (R 36) filed answers to Martin's petition and after oral argument on the basis of the record before the Commission the District Court made findings of fact and conclusions of law to the effect that the Commission's report and order are not supported by substantial evidence (R 40). Judgment was entered August 25, 1953, (R 74) annulling and vacating the order and remanding the cause to the Commission with directions to take further action not inconsistent with the Court's opinion, findings and conclusions. (App. 1a-25a)

The Commission and Southern Pacific Company gave notice of appeal (R 76) and appealed the judgment of the District Court to the Court of Appeals. The United States did not join in the aforesaid appeal. Martin opposed the appeal of the Commission and Southern Pacific in the Court of Appeals. Briefs were filed by all parties and oral argument was had and on January 10, 1955, the Court of Appeals filed an opinion, concurring opinion and dissenting opinion reversing the judgment of the District Court. Martin petitioned the Court of Appeals for rehearing which was denied on March 1, 1955. Martin then petitioned the Supreme

Court for a writ of certiorari on grounds different from those expressed in this petition, which petition was denied by the Court on October 10, 1955. Whereupon Martin filed a motion with the Supreme Court requesting that its order denying Martin a writ of certiorari be set aside and the matter be held in abeyance pending a decision by the Court of Appeals on the question of its jurisdiction. This motion was denied December 5, 1955. (No. 85, October Term, 1955).

On November 3, 1955, Martin timely filed a motion in the Court of Appeals to dismiss the appeal of the Commission and Southern Pacific Company on the grounds that the Court of Appeals lacked jurisdiction to entertain the appeal, for the reason that the statutes require such an appeal to be taken direct to the Supreme Court. (App. 25a-28a) The Commission and Southern Pacific Company filed opposition to the motion. Oral argument was had on the motion on November 15, 1955. Following which the Court of Appeals entered its order of January 12, 1956, denying Martin's motion to dismiss the appeal of the Commission, et al. (App. 29a) The denial of this motion by the Court of Appeals is the sole basis for this petition.

REASONS FOR GRANTING THE WRIT

The action of the Court of Appeals in entertaining the respondent's appeal from the judgment of the District Court and its judgment on such appeal is void ab initio for the following reasons:

Pursuant to the procedure outlined by and the authority contained in Sections 2321 to 2325 (28 U.S.C. §§2321-2325) and Section 1336 (28 U.S.C. § 1336) (App. 30a-31a) Martin commenced this proceeding against the United States and the Interstate Commerce

Commission by filing in the United States District Court a petition to enjoin and set aside the order of the Commission entered March 12, 1951 on the ground that said order was without support in and contrary to law (R. 3-28). In its petition, Martin requested that a three judge court be convened to hear the case (R. 27) which request was denied by the District Judge (App. 2a) (R. 43). After a full hearing of the case with all parties represented, the District Court rendered its opinion (R. 42) (App. 1a-25a) and entered its judgment ordering the Commission's order of March 12, 1951, set aside and enjoined (R. 74).

The respondents, Interstate Commerce Commission and Southern Pacific Company, the then intervener, gave notice of appeal (R. 76) and appealed the decision of the District Court to the Court of Appeals. Petitioner submits that this appeal was not taken in accordance with the existing statutes and the Court of Appeals was without jurisdiction or authority to hear it. Section 1291 of the U. S. Code, Judiciary and Judicial Procedure (28 U.S.C. § 1291) (App. 30a) provides: that United States Courts of Appeal have jurisdiction of appeals from decisions of the United States District Courts, *except where* a direct review may be had in the Supreme Court; and Section 1253 (28 U.S.C. § 1253) (App. 29a) provides: that except as otherwise provided by law, any party *may appeal to the Supreme Court* from an order granting an injunction in any civil action or proceeding required by an act of Congress to be heard and determined by a District Court of three judges. Sections 2321-2325 inclusive (28 U.S.C. §§ 2321-2325) (App. 30a-31a) provides: that the procedure in actions to enjoin, set aside, annul or suspend in whole or in part any order of the Inter-

state Commerce Commission other than for the payment of money or the collection of fines shall be: that the action be brought against the United States; that the Attorney General represent the government "in the District Courts and *in the Supreme Court of the United States upon appeal from the District Courts*"; that in such action the Interstate Commerce Commission and any party in interest to the proceedings before the Interstate Commerce Commission may appeal and be represented by counsel; and that an injunction restraining the enforcement of any order of Interstate Commerce Commission shall not be granted until the application be heard and determined by a District Court of three judges.

Section 1253 (28 U.S.C. § 1253) (App. 29a) provides: that except as otherwise provided by law any party may appeal to the Supreme Court from an order granting or denying an injunction in any action or proceeding required by any act of Congress to be heard and determined by a District Court of three judges.

In the case of *United States* v. *Interstate Commerce Commission (1949)* 337 U.S. 426, this Court decided, among other things, that the order of the Commission at issue in that case was not reviewable by a three judge court. Based upon this authority the District Court denied the petitioner's request for a three judge court (R. 43). (App. 2a) However, that case involved overcharges by the railroad and an alleged violation of Section 8 of the Interstate Commerce Act, giving rise to an election under Section 9 to proceed before the Commission or before a court for the recovery of such overcharges.

The present proceeding does not involve Sections 8 or 9 of the Interstate Commerce Act, nor any order of

the Commission based upon either of those sections. The charge against the railroad before the Commission in this proceeding is that the railroad violated its duty to furnish adequate car service and its duty not to unduly discriminate against a particular shipper or a charge of violation of Sections 1 and 3 of the Interstate Commerce Act. (App. 31a-32a)

It is, clear that the Court of Appeals had no jurisdiction to entertain the appeal from the decision of the District Court in this case and that such appeal, if any, should have been taken under the applicable statutes to the Supreme Court.

CONCLUSION

This case presents the direct question of the jurisdiction of the United States Court of Appeals for the Ninth Circuit to entertain an appeal from a decision and judgment of the United States District Court for the District of Oregon, which appeal is not authorized by law.

It is respectfully submitted that this Honorable Court should grant the petition for a Writ of Certiorari.

GEORGE L. QUINN, JR.
815 - 15th Street, N. W.
Washington 5, D. C.

IRVING RAND,
DONALD A. SCHAFER
Public Service Building
Portland 4, Oregon
Attorneys for Petitioner, The Martin Brothers Box Company

APPENDIX

APPENDIX

APPENDIX

Opinion of the District Court

May 15, 1953

SOLOMON, JUDGE:

Plaintiff, Martin Brothers Box Company, hereinafter sometimes called "complainant," filed a petition in this court pursuant to 28 USCA 1336 to set aside an order of the Interstate Commerce Commission, hereinafter called the "Commission," dismissing the complaint of the plaintiff in a proceeding brought before the Commission. The United States of America and the Commission have no financial interest in this case but, because of statutory necessity (28 USCA 2322), they were made parties defendant. Southern Pacific Company, the defendant in the proceeding before the Commission and the intervenor herein, shall hereafter be referred to either as "Southern Pacific" or "defendant."

Plaintiff, by complaint filed against Southern Pacific with the Commission on October 14, 1947, alleged that Southern Pacific, during the period from January 1, 1947, to September 30, 1947, failed in its duty to provide and furnish transportation from plaintiff's plant at Oakland, Oregon, upon reasonable request therefor, and failed in its duty to furnish safe and adequate car service at that plant in violation of § 1 (4) and § 1 (11) of the Interstate Commerce Act, hereinafter referred to as the "Act" [49 USCA § 1 (4) and § 1 (11)]. By reason thereof, plaintiff alleged that it was caused undue and unreasonable prejudice and disadvantage in violation of § 3 (1) of said Act. Plaintiff, under § 9 of the Act, requested an award of reparations in the sum of $2,259,000.

A hearing was had on such complaint before an Examiner in Portland, Oregon, and, on September 1, 1950, the Examiner filed his proposed report in which he found de-

fendant had violated its duty to furnish plaintiff adequate car service, and recommended an award of reparations in the amount of $135,220.56, with interest. Exceptions were filed by both plaintiff and Southern Pacific to such report and, following a hearing before its Division 3, the Commission, on March 12, 1951, rendered its decision in which it dismissed plaintiff's complaint. (Martin Brothers Box Co. v. Southern Pacific, 280 I.C.C. 395.)

A petition for reconsideration was denied by the full Commission on June 30, 1951.

Plaintiff, in its petition filed in this court on November 26, 1951, requested a hearing before a 3-judge court and the Southern Pacific, in addition to its general denial, raised the special defense that this court, under § 9 of the Act, lacks jurisdiction to review an order of the Commission denying reparations.

On the authority of United States v. Interstate Commerce Commission, (1949) 337 U. S. 426, the request of plaintiff for a 3-judge court was denied and the special defense of the Southern Pacific was overruled.

There is no substantial dispute between the parties as to the scope of review by this court of the Commission's order. This court, according to United States v. Interstate Commerce Commission, (D. C. Cir. 1951), 198 F. 2d 958, 964, is

> "to apply the standards of judicial review which are generally applicable to administrative action—the standards reflected in the Administrative Procedure Act, § 1 et seq. 5 U.S.C.A., § 1001 et seq., and in such decisions as Universal Camera Corp. v. N.L.R.B., 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456; United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 489, 62 S. Ct. 722, 86 L. Ed. 971; Gray v. Powell, 314 U. S. 402, 412, 62 S. Ct. 326, 86 L. Ed. 301; Rochester Telephone Corp. v. United States, 307 U. S. 125, 129, 59 S. Ct. 754, 83 L. Ed. 1147; and Chicago Junction Case, 264 U. S. 258, 265, 44 S. Ct. 317, 68 L. Ed. 667."

In other words, this court is limited to determining whether there was a rational basis for the final order of the Commission, and, unless the order is not supported by substantial evidence or is contrary to law, it may not be disturbed.

With this standard in mind, I desire to examine the findings of the Commission. A summary of the facts found by both the Examiner and the Commission follows:

On February 28, 1946, the plaintiff purchased a lumber mill located at Oakland, Oregon, from the A. K. Wilson Lumber Company, primarily to establish a plant for the manufacture of wirebound boxes as well as to supply lumber for its plant located at Toledo, Ohio.

Plaintiff planned to continue the operation of the lumber mill at Oakland and estimated that 5 or 6 cars would be needed each day for the shipment of lumber. This plant had previously been given an allotment of 5 cars a day by Southern Pacific on the basis of the former owner's requirements as a lumber mill. Plaintiff also planned to enlarge and improve the facilities and install machinery for the manufacture of wirebound boxes and to begin production of boxes, with one shift, about the middle of 1946. It was planned to add a second and, later a third shift when trained personnel was available. For each shift in the wirebound box department, it was estimated that from 3 to 4 cars would be needed each day for the shipment of boxes, or a total of approximately 13 cars a day.

Before purchasing the Oakland mill, an option thereon and an option on nearby standing timber were obtained. Before exercising its option, plaintiff discussed its plans with defendant's officers and made known its requirements. After receiving defendant's assurances that sufficient freight cars would be furnished to it, plaintiff exercised such options.

By August, 1946, the box-making machinery was installed. However, even earlier, plaintiff established a sales office in Los Angeles and, before any boxes were manufactured, these salesmen booked order for about 200 carloads of boxes. Because of its inability to obtain sufficient box cars for shipments of lumber to Toledo, the salesmen were instructed to relax their sales efforts. By letters dated July 30 and August 6, 1946, the plaintiff advised the defendant's manager of perishable freight traffic and a district freight agent, both at San Francisco, of its desperate need for cars; that the immediate minimum requirements of the plant were 36 cars per week or 150 cars per month; and that the needs of the plant would shortly be increased to about 250 cars a month. At various times prior to and during the first 9 months of 1947, the plaintiff complained to the defendant that adequate cars were not being received and that additional cars were urgently needed not only to ship lumber to its Toledo plant but also to fill orders of producers of perishable commodities which, in turn, urgently needed the containers for shipment of their produce.

One of plaintiff's Los Angeles salesmen, who had been notified to stop taking further orders, came to Oregon, where he spent 1½ months in Oakland during the fall of 1946, and 3 months during the spring of 1947, during which time he exerted all his efforts to obtain more cars. He made telephone calls each morning before 7:45 a.m. to the office of the defendant's local freight agent at Roseburg, Oregon, and went over the switch list with defendant's employees to ascertain how many cars, if any, were to be spotted at the plaintiff's plant that day. On several occasions, on days when no cars were assigned, he induced such employees to reconsider and assign a car for the plaintiff's plant. He made trips to Medford, Oregon, and called on the defendant's division freight and passenger agent, who agreed to do all he could to afford relief. Plaintiff's employee also called on the defendant's freight traffic manager at Portland and discussed the situation with

him. In one discussion with that official, he was informed that the plaintiff's fixed freight car quota was only 5 cars a day, the same as that assigned to the former owner of the Oakland mill. He was later told that the quota would be changed to 10 cars a day, but that, because of the car shortage, there was doubt that the plaintiff could be given more than 50 per cent of its quota.

The defendant maintained an agent at Oakland who was in daily contact with the plaintiff's plant and sometimes went there two or three times a day. In addition, one of plaintiff's employees generally vsited defendant's office at Oakland both in the morning and afternoon of each day. While there, he often called the defendant's office at Eugene with respect to the assignment of cars. The defendant's agent at Oakland admitted that he knew plaintiff desired additional cars and that, in response to the latter's request, he attempted to obtain them through various officials of the defendant.

Plaintiff had orders that were sufficient for operation of the Oakland plant at capacity during the complaint period. It usually operated only one shift. For short periods of time, the plaintiff was required to cease its operations. Plaintiff gave some of its orders to another manufacturer of boxes and a few orders were delivered by truck. Due to plaintiff's inability to fill orders when needed, many orders were cancelled.

As a result of the inability to obtain lumber from Oakland, the operations of the Toledo, Ohio, plant was curtailed. The Toledo plant was operated with two shifts until March 18, 1947, and with one shift thereafter. About 65 carloads of lumber a month were required to keep each shift running. Most of the lumber was purchased in the open market, but plaintiff was unable to purchase enough in the open market to satisfy the needs of the Toledo plant.

The cars shipped from Oakland to Toledo during the complaint period were as follows:

January	32	June	6
February	47	July	2
March	27	August	6
April	10	September	None
May	12		

Including the cars shipped to Toledo, plaintiff received a total of 593[1] cars during the complaint period.

The testimony of W. F. Forrest, "a person of considerable transportation experience," who was employed by plaintiff "to make a survey of the other shippers on the defendant's lines concerning their orders and deliveries during the period covered by the complaint," was reviewed. Mr. Forrest traveled 7,752 miles and interviewed the traffic personnel of many shippers at numerous points on the defendant's lines. "He claims to have found evidence of delay in filling car orders only at non-competitive points." He also made a study of defendant's records of plaintiff's written car orders for the whole complaint period and of six other shippers, three of whom were located in Eugene, two in Portland, and one in Salem, for the months of July, August and September, 1947. Solely on the basis of these written car orders, he found that plaintiff promptly received all of the cars which it ordered up to July 1, and that during the remaining three months, plaintiff, but not

---

[1] In this opinion, as in the Commission's opinion, the number of cars furnished was adjusted to reflect the regulations of a service order of the Commission which permitted the use of two or three refrigerator cars in place of one boxcar, depending upon the size of the boxcar ordered. The 593 cars were delivered as follows:

January	98	June	63
February	78	July	62
March	87	August	58
April	40	September	58
May	54		

the other six shippers, encountered a considerable amount of delay in receiving cars.

Mr. Forrest further testified that Timber Structures, Inc., a large Portland lumber company, for whom he acted as traffic manager, "ordered its cars by phone and experienced no difficulty in obtaining cars from the defendant during 1947."

There was also introduced in evidence an

> "excerpt from a transcript taken for this Commission on April 30, 1947, at a hearing on an application for a water carrier for additional operating authority. The excerpt submitted consisted of testimony by a representative of the defendan' who claimed that it was at that time experiencing no shortage of cars."

The defenses interposed by the defendant were described as follows:

> "The defendant states that its ability to supply cars in 1947 was adversely affected by unusual, unavoidable and unforeseeable conditions resulting from World War II; that at all times during the complaint period it distributed cars to the complainant on a reasonable basis; and that during the complaint period it actually delivered to the complainant more cars than were specifically ordered."

With reference to the defendant's contention that it could not anticipate the unusual demand for cars that arose in 1947, the Commission recited a number of facts on the basis of which it found:

> "On these facts the defendant cannot be held accountable for general car shortages on its lines within the period covered by this complaint."

With reference to the defendant's next contention, the Commission stated:

> "In support of its contention that cars were distributed to the complainant on a reasonable basis, the

defendant showed that during the period concerned the complainant received more cars than it requested by written car orders, whereas other shippers on its lines, including the Portland division, were furnished on the average only 80 per cent of the cars ordered by them. From January 1 to June 30, 1947, cars were furnished to the complainant in practically complete compliance with written car orders, and in the remainder of the period more cars than ordered were furnished, but some delay was encountered. In the latter period, the distribution of cars to shippers on the Portland division, including the complainant, was made on a percentage-of-quota basis; that is, if the available car supply on a particular day was only 50 per cent of the aggregate capacity of the district, each shipper was assigned only 50 per cent of its quota, except that no cars would be assigned to a shipper which had no orders on file. During the first six months of the complaint period, the car shortage was not as severe as during the later period; but some shortage did exist, and cars were allegedly distributed to each shipper in proportion to the number of empty cars available."

The Commission described the method by which the plaintiff gave orders for cars to the defendant's local agent at Oakland, and then stated:

"Under normal conditions it is the practice for shippers to order the specific number of cars wanted and, therefore, the defendant insists that inasmuch as the complainant received more cars than were specifically ordered, it has no legitimate reason to complain that the distribution of cars made was other than reasonable. The complainant indicated generally that it wanted more cars than were furnished and this is admitted by the Oakland agent of the defendant. It appears that the written car order blanks, which were filled out and given to the defendant's agent after the complainant knew what cars had been assigned to it for the particular day, were to a large extent nothing more than a written confirmation, for the defendant's records, that the complainant wanted the cars that had been assigned to it for that day."

The Commission reviewed the evidence on the claim of the defendant that a number of cars were kept by plaintiff on its siding from 3 to 7 working days during the complaint period. This evidence was introduced to rebut plaintiff's contention that it was not furnished all the cars which it needed. The Commission concluded its discussion by stating:

> "Under emergency conditions such as exist during a period of car shortage, a carrier may be justified in refusing cars to a shipper negligently withholding from shipment cars previously furnished to it. While there is no indication that the defendant's car service practices with respect to the complainant were affected by the holding referred to of cars by the complainant, such holding is relevant in a consideration of the complainant's ability to load cars in addition to those which were furnished."

The Commission then referred to the testimony of the defendant that plaintiff was not in competition with shippers at terminal points and that

> "conditions and circumstances affecting the promptness of car supply at terminals are such as necessarily give shippers there located a natural advantage over shippers at nonterminal points."

This testimony was offered to rebut plaintiff's evidence that shippers at terminal points received better service.

Finally, the Commission reviewed plaintiff's evidence on its claim for damages against the defendant.

Under the heading, "Conclusion," the Commission stated:

> "The evidence establishes that from January 1 to June 30, 1947, complainant received practically all of the cars for which specific written car orders were placed; that thereafter in the complaint period more cars were furnished than were requested by written orders, though some delays were experienced; that

complainant desired, required, and attempted to secure additional cars from defendant; that defendant and its employees made reasonable, and sometimes successful, efforts to furnish additional cars to complainant; that by reason of its inability to secure cars at all times when needed complainant was unable to fill some orders placed with it; that during 1947 defendant suffered a daily shortage of 583 freight cars; that such shortage was a general one for which no direct responsibility can be placed upon defendant; and that it is not shown that defendant unduly favored shippers other than complainant.

"Complainant alleges violations of Section 1 (4), Section 1 (11) and Section 3 (1) of the Interstate Commerce Act. Under those sections defendant is required, in part, to provide and furnish transportation upon reasonable request; to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and not to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, locality, or territory. The right of a shipper to cars, however, is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The law exacts only what is reasonable from such carriers but, at the same time, requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not identically. Pennsylvania R. Co. vs. Puritan Coal Mining Co., 237 U. S. 121 and Midland Valley R. Co. vs. Barkley, 276 U. S. 482. Considering the above, in the light of the facts of this record, we conclude that complainant has failed to establish any violation of sections 1 and 3 as alleged. Moreover, the evidence presented falls far short of the requirements in a proceeding of this character to support an award or reparation. Where special damages are sought, the proof thereof must be as definite and certain as would be necessary under established

principles of law to support a judgment in court. Lignum-Vitae Products Corp. vs. Alabama G.S.R. Co., 268 I.C.C. 599, 608.

"We find that complainant has failed to establish that defendant during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of section 1 of the Act in furnishing or not furnishing cars to complainant at Oakland, Oreg., or that defendant subjected complainant to any undue prejudice in violation of section 3. The complaint will be dismissed."

Except for the findings of the Commission above quoted under the heading, "Conclusions," the statement of the evidence and the findings of the Examiner were practically identical to those of the commission. The Examiner recommended an award of reparations and the Commission dismissed plaintiff's complaint.

I previously indicated that the court is charged with the duty of determining whether there is a rational basis for the Commission's conclusions. Or, stated differently, whether the Commission's conclusions are supported by substantial evidence, considering the whole record, and whether, in arriving at those conclusions, it correctly applied the applicable law.

In my opinion, the statement set forth in the second paragraph of the conclusions correctly set forth the rules of law relative to the distribution of cars by a railroad. A railroad, under § 1 (4), § 1 (11) and § 3 (1) of the Act is required:

1. To furnish transportation upon reasonable request.

2. To establish and enforce reasonable rules with respect to car service.

3. To refrain from causing any undue influence or unreasonable preference or advantage to any particular person, company, locality, or territory.

4. To treat shippers fairly, if not identically, in case of a car shortage.

There remains the question of whether the other conclusions are supported by substantial evidence and are not contrary to law. I will consider each statement in the Commission's conclusions separately

I.

> "The evidence establishes that, from January 1 to June 30, 1947, complainant received practically all of the cars for which specific written car orders were placed; that thereafter in the complaint period more cars were furnished than were requested by written orders, though some delays were experienced."

This statement was based upon the testimony of W. F. Forrest, plaintiff's expert, whose testimony was admittedly based upon exhibit S, which he prepared solely from the written car orders taken from the defendant's file. This statement is relevant only if plaintiff was required to show, as a condition precedent to its right to cars, that it either placed specific written car orders or specific oral car orders for the cars that it desired.

Although the Commission, in such statement referred solely to written car orders, it is relevant to determine whether plaintiff was required to place car orders for a particular number of cars, of a particular type, for delivery to plaintiff on specified days, before the Commission can find that the defendant failed to furnish freight cars upon the "reasonable request" of plaintiff.

The findings of the Commission, heretofore summarized, and the evidence upon which such findings are based, show the continuous requests of plaintiff to secure additional box cars to partially satisfy its urgent need for such cars.

In spite of defendant's knowledge of the needs of plaintiff and its almost daily requests for such cars, defendant

contends that such requests do not meet the requirements of specificity demanded by the Act.

In support of this contention, defendant cites:

1. Victor-American Fuel Co. vs. Denver & Salt Lake Railroad Co., 115 I.C.C. 169. (1926.)
2. Winters vs. Chicago-Milwaukee Railroad Co., 87 I.C.C. 113. (1923.)
3. DiGiorgio Importing Co. vs. Pennsylvania Railroad Company, (Md., 1906), 65 Atl. 425.
4. Koepp vs. New Orleans Great Northern Railroad Co., (La., 1926), 110 So. 729.
5. Simmons vs. Seaboard Airline Railroad Co., (Ga., 1909), 66 S. E. 783.
6. 13 Corpus Juris Secundum § 37, page 74.
7. 90 American Jurisprudence 630.

The Victor-American and the Winters cases, both of which are Commission decisions, do not even remotely involve the problem before us.

In the DiGiorgio case, plaintiff, a shipper, brought an action against the railroad in the state court for breach of its common law duty to furnish cars. Plaintiff had ordered a specific number of refrigerator cars to ship four boatloads of bananas consigned to it from Jamaica and Cuba. The requisition designated the date of the arrival of the first ship, but did not designate the arrival date of the other three ships. The first ship and one other arrived on the same day and sufficient cars were supplied by the defendant. A few days later, two other ships arrived and the defendant failed to provide a sufficient number of cars to remove the entire cargo. The defendant proved that it had no notice from plaintiff or from any other source, of the approach or expected arrival of the two later ships and a judgment in favor of the defendant was therefore affirmed.

Both the Koepp and the Simmons cases were also actions in state courts under state laws. They involved specific written car orders, but in both cases the carrier was not

informed, and had no knowledge, of the type or types of cars required by the shipper. The court in each case found that the shipper required different types of cars for the commodities it manufactured. In the case at bar, the Southern Pacific knew that plaintiff wanted box cars. In fact, Southern Pacific complained that plaintiff always wanted box cars, the type of freight car in greatest demand.

These three state court cases, as well as three other cases are cited in the Corpus Juris Secundum reference to support the text which lays down the requirements of specificity as to the number and character of the cars desired and the time such cars are to be furnished. The other three cases are:

1. Weida vs. Chicago Railroad Co., (Minn., 1898), 75 N. W. 121.
2. Central of Georgia Railroad Co. vs. Rabun, (Ga., 1917), 94 S. E. 598.
3. Stratton vs. Acheson, Topeka & Santa Fe, (Kan., 1925), 236 Pac. 831.

The Weida case involved an interpretation of written car orders placed by a shipper located on a narrow gauge track. He successfully contented that, in accordance with the usual practice, he was entitled to twice the number of cars ordered for the 14-mile trip over the narrow gauge road.

In the Rabun case, plaintiff relied on three written car orders. A judgment in favor of plaintiff was reversed because plaintiff was merely an agent for the shipper and the court held an agent was not entitled to recover a statutory penalty.

The Stratton case involved an action for statutory damages under a state law for the failure to furnish two cars. From a verdict in favor of the plaintiff, the railroad appealed because a state public utility commission regulation required that car orders be in writing and contain informa-

tion as to the number and type of cars wanted and, in the case of a wheat shipper, the quantity of wheat on hand. Plaintiff, a wheat shipper, had failed to state the quantity of wheat on hand in its order for one of the cars and therefore the judgment of the trial court was reversed as to such car.

None of the cases upon which defendant relies support its contention that plaintiff's requests for cars were insufficient because of lack of specificity or that such requests were not reasonable requests within the meaning of the Act.

In my opinion, the portion of the Commission's conclusions relative to written car orders has no bearing on any issue of this case and, if the Commission did premise its dismissal of plaintiff's complaint on this portion of its conclusions, then it is erroneous as being contrary to law.

II.

> "complainant desired, required and attempted to secure additional cars from the defendant;"

The findings of the Commission heretofore summarized relative to the attempts of plaintiff to secure additional freight cars are supported by substantial evidence and form an adequate basis for this conclusion of the Commission.

III.

> "defendant and its employees made reasonable, and sometimes successful, efforts to furnish additional cars to complainant;"

The only evidence to support this conclusion is summarized in the findings of the Commission.

One of plaintiff's Los Angeles salesmen, who had been instructed to refrain from taking further orders, came to Oakland where:

"He spent 1½ months in Oakland during the fall of 1946 and 3 months during the spring of 1947, during which time he exerted all his efforts to obtaining more cars. He made daily telephone calls each morning before 7:45 a.m., to the office of the defendant's local freight agent at Roseburg, Ore., and went over the switch list of the defendant's employees to ascertain how many cars, if any, were to be spotted at the complainant's plant that day. *On days when no cars were assigned, he on several occasions induced the defendant's employees to reconsider and assign a car for the complainant's plant.*" (Emphasis added).

This salesman was told that plaintiff's quota was only 5 cars a day, the same as they assigned to the former owner of the Oakland mill.

"He was later told that the quota would be changed to 10 cars a day, but that because of the car shortage there was doubt that the complainant could be given more than 50 per cent of its quota. • • •

"The defendant's agent at Oakland admitted that he knew complainant desired additional cars and that in response to latter's requests, he attempted to obtain them for the complainant through various other officials of the defendant."

The other findings of the Commission summarized in this opinion relative to the requirements of the plaintiff, the number of cars which it received, its efforts to secure additional cars, and the number of cars which other shippers on the Portland Division received during the same period, show that there was no substantial evidence to support the Commission's conclusion that defendant "made reasonable and sometimes successful efforts to secure additional cars for the complainant." A "reasonable effort" implies conduct in accordance with the defendant's statutory duty not to prefer "any particular person, company, locality, or territory," and likewise its statutory duty in case of a car shortage to "treat shippers fairly, if not identically."

IV.

"by reason of its inability to secure cars at all times when needed complainant was unable to fill some orders placed with it;"

The findings of the Commission and the evidence upon which such findings were based amply support this conclusion.

V.

"during 1947 the defendant suffered a daily shortage of 583 freight cars; that such shortage was a general one for which no direct responsibility can be placed upon the defendant;"

Here again, the findings of the Commission and the evidence upon which they were based amply support this conclusion.

However, it should be noted that the car shortage was not uniform throughout the entire complaint period. During the months of January and May, and during the first part of June, there was little, if any, shortage of box cars on the Portland Division. During the balance of the period, there were car shortages which varied in intensity. In August and September, the car shortage was most severe.

VI.

"it is not shown that the defendant unduly favored shippers other than complainant."

The Commission found that other shippers on the Portland Division during the complaint period were furnished on an average of 80[1] per cent of the cars ordered by them. This includes the period beginning July 1, 1947, to September 30, 1947, when the car shortage was more severe

[1] This figure is an average of box cars, flats and gondolas. The average for each type of car is: box cars—76%; flats—85% and gondolas—78%.

and during which period the Southern Pacific adopted and placed in effect a car distribution rule based upon the "production capacity" of its shippers. It is contended that such rule operated to give each shipper its proportionate share of the total cars available.

The witness for defendant who explained the operation of the rule qualified it by stating, "We would take into consideration the car orders that were filed by the mill."

I have previously held that the written car orders placed by plaintiff with the defendant were no indication of the number of cars required, needed, or requested by the plaintiff and that the plaintiff made reasonable requests within the meaning of the Act for all of the freight cars which it required.

The Commission found that, during the complaint period, plaintiff had orders for and could have operated at capacity except for the lack of freight cars; that the plaintiff required 13 freight cars a day to operate at capacity. The Commission also referred to the testimony of one of plaintiff's witnesses who testified that the quota of plaintiff was only 5 cars a day, the same that had been assigned to the former owner who only operated a lumber mill and had no box manufacturing facilities, but that plaintiff's quota would be raised to 10 cars a day.

In view of the productive capacity of plaintiff's lumber and box manufacturing plants at Oakland and the information concerning such operations which were communicated to defendant and of which defendant had personal knowledge, plaintiff was entitled to a quota in excess of 5 cars a day. However, even on the basis of only 5 cars a day, the evidence showed that plaintiff did not receive its proportionate share of the freight cars as compared to the freight cars received by other shippers.

Plaintiff received an adjusted total of 593 cars during the complaint period or an average of 3.1 cars for each

working day. The Commission, in its findings, referred to the testimony of Mr. Forrest, heretofore summarized, who, as a result of his extensive investigations, "claims to have found evidence of delay in filling car orders only at non-competitive points." It also referred to his testimony that Timber Structures, Inc., for whom he acted as traffic manager, "ordered its cars by phone and experienced no difficulty in obtaining cars from defendant during 1947." This testimony was uncontradicted and, in my opinion, is corroborated by the defendant's own evidence.

Defendant's Exhibit 29, is entitled, "Freight Car Shortage—January 1-September 30, 1947, inclusive, Nationally and S. P. Pacific Lines."

Defendant's Exhibit 31 is entitled "Daily Average Cars Ordered and Furnished Portland Division and Pacific Lines 12/29/46 to 10/4/47."

These exhibits show that, even during the periods in which there was little or no shortage of box cars on the Portland Division of the defendant, plaintiff received only a small proportion of the cars which it required.

January

Exhibit 29: During the month of January, there was no shortage of box cars on defendant's lines.

Exhibit 31: 83 per cent of the box cars ordered were furnished.

Plaintiff received 89 box cars and 12 other cars or an adjusted total of 98 cars.

April

Exhibit 29: There was a slight box car shortage for the week ended April 19, and no shortage for the weeks ended April 26 and May 3.

Exhibit 31: From the week ended April 4 to the week ended May 3, 92 per cent of the box cars ordered were furnished.

Plaintiff received 40 box cars.

May

Exhibit 29: No shortage of box cars for the month of May.

Exhibit 31: From the week ended May 10 to the week ended May 31, all box cars ordered were furnished.

Plaintiff received 54 cars, one of which was a flat car.

June

Exhibit 29: For the weeks ended June 7 and June 4, there was no shortage. For the week of June 21, there was a slight shortage and for the week ended June 28, a moderate shortage.

Exhibit 31: From the week ended June 1 to the week ended July 5, 97 per cent of the box cars ordered were furnished.

Plaintiff received 73 cars, 16 of which were refrigerator cars or an adjusted total of 63 cars.

The Commission may also have relied on the fact that plaintiff was not in competition with any shipper at terminal points where "conditions and circumstances affecting the promptness of cars supplied at terminal points are such as necessarily give shippers there located a natural advantage over shippers at nonterminal points."

I would have regarded this statement of the Commission merely as a comment on a contention of the defendant, except for the fact that the Commission's attorneys, on page 32 of their brief filed in this court, found some connection between such statement and the Commission's

conclusions that no competitor of plaintiff was unduly preferred.

Nothing in the Act and no decision that I have been able to find permits discrimination as between shippers merely because they are not in the same type of business and therefore do not compete against each other.

The natural advantage of being at a terminal point may on occasions result in more rapid service and slight difference in the cars made available to such shipper but it can not justify the wide disparity of cars shown by the evidence in this case to have been delivered to shippers at terminal points over a shipper at a nonterminal point.

Considering the whole record, I am of the opinion that there is no substantial evidence upon which the Commission could have concluded that the "defendant did not unduly favor shippers other than the complainant."

VII.

> "Considering the above, in the light of the facts of this record, we conclude that complainant has failed to establish any violation of sections 1 and 3 as alleged. * * *
>
> "We find that the complainant has failed to establish that defendant during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of section 1 of the Act, in furnishing or not furnishing cars to complainant at Oakland, Oreg., or that defendant subjected complainant to any undue prejudice in violation of section 3. The complaint will be dismissed."

If this ultimate conclusion refers solely to the preceding conclusions of the Commission, such ultimate conclusion is not supported by substantial evidence and is contrary to law. However, the Commission's statement, "Considering the above in the light of the facts of this record," requires an examination of the evidence adduced at the hearing and particularly the Commission's other

findings, to determine whether such evidence or findings afford a rational basis for the Commission's ultimate conclusion.

The only other evidence and the only other finding relied upon by the defendant to support the Commission's ultimate conclusion relate to the length of time plaintiff retained freight cars on its siding.

The Commission, on page 402 of its opinion, stated:

> "In a further effort to support its contention that the complainant has no legitimate complaint that the distribution of cars made was other than reasonable, and to rebut the evidence that the complainant was not furnished all the cars needed by it, the defendant shows that a number of cars were kept on hand on the complainant's siding for several days during much of the complaint period. Most of the cars placed on the complainant's siding during the period under consideration were on hand when the 7 a.m. track check was made on only 1 or 2 days. One car was on hand 7 days, 2 cars were on hand 6 days, 11 cars were on hand on 5 days, 22 cars were on hand on 4 days, and 56 cars were on hand on 3 days. The complainant indicates that these may have been cars that were restricted for loading to particular destination areas for which it had no immediate traffic available. During this period the destination of certain cars was restricted by orders of the Car Service Division of the Association of American Railroads. Automobile cars were required to be moved back to automobile production territory, certain gondola cars were required to be moved back to eastern Allegheny territory and to points served by the Denver and Rio Grande Western Railroad Company, and certain other cars owned by Canadian roads had to be moved back to Canada.
>
> "Under emergency conditions such as exist during a period of car shortage, a carrier may be justified in refusing cars to a shipper negligently withholding from shipment cars previously furnished to it. While there is no indication that the defendant's car service practices with respect to the complainant were affected by the holding referred to of cars by the complainant,

such holding is relevant in a consideration of the complainant's ability to load cars in addition to those which were furnished."

In view of its other findings, the Commission apparently did not consider the evidence as significant or relevant except in connection with "a consideration of the complainant's ability to load cars in addition to those which were furnished," as to which there was no issue. Defendant did not contend and no evidence was introduced to show that plaintiff, at any time during the complaint period lacked the necessary facilities or the personnel to promptly load all of the freight cars necessary to satisfy its requirements.

In my opinion the Commission did not intend to support its conclusions by the statements or findings hereinbefore set forth. In addition, an examination of Exhibit 42, upon which such statements or findings were based, when considered in the light of the other evidence, reveals its lack of any probative value.

1. Some of the entries in Exhibit 42 are inconsistent with the defendant's Exhibit 40, which latter exhibit shows the cars furnished plaintiff.

2. A great majority of the cars were moved out within 2 days.

3. When a car was held for more than 3 days, from 13 to 23 other cars were moved in, loaded, and moved out within such period.

4. Of the 664 cars[1] furnished during the complaint period, only 36 were found to be on plaintiff's siding for more than 3 days, when the daily 7 a.m. track check was made.

---

[1] The 593 figure heretofore used in this opinion is the adjusted figure. For explanation see note on page 6 of this opinion.

5. During the months of August and September, 35 per cent and 60 per cent of all cars furnished plaintiff were not box cars, but were refrigerator, stock, flat or gondola cars. The same situation obtained, to a lesser extent, in other months during the complaint period. A number of these cars were of limited value to the plaintiff. The automobile and refrigerator cars were restricted to particular destinations and the refrigerator cars could only be used for the shipment of boxes and they could only be loaded by hand.

It is apparent therefore that the statements of the Commission relative to the length of time cars were retained on plaintiff's siding do not support the Commission's conclusions.

VIII.

> "Moreover, the evidence presented falls far short of the requirements in a proceeding of this character to support an award of reparation. Where special damages are sought, the proof thereof must be as definite and certain as would be necessary under established principles of law to support a judgment in court. Lignam-Vitae Products Corp., v. Alabama G. S. R. Co., 268 I.C.C., 599, 608."

Plaintiff admits that several of the items of damage which it originally claimed were not properly chargeable to the defendant and that other items were so indefinite and speculative as to offer no reasonable basis for an award of damages. All of such items were properly disallowed by the examiner. However, the record does contain evidence of damage as to other claims which will support an award of reparations. A railroad which has violated its statutory duty and has caused a shipper to suffer damage will not be permitted to escape liability solely because the shipper is unable to prove the exact amount of damage suffered. Midland Valley R. Co., v. Excelsior Coal Co., 86 F. 2d 177, 183, (8 Cir. 1936).

I am in complete accord with the rule that the conclusions of the Commission shall not be overturned except in the rare instances in which there is no rational basis for such conclusions. When a court finds it necessary to overrule a decision of such expert administrative tribunal, I believe that it should set forth in detail the reasons which impel such action. That is my only justification for such a long opinion.

For the reasons heretofore set forth, plaintiff is entitled to a judgment remanding this matter to the Commission for further proceedings in conformity with this opinion.

[Endorsed]: Filed August 25, 1953.

Motion to Dismiss

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14077

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation, *Appellants*,

v.

THE MARTIN BROTHERS BOX COMPANY, a corporation, *Appellee*.

MOTION OF THE MARTIN BROTHERS BOX COMPANY TO DISMISS

Comes now The Martin Brothers Box Company, a corporation, designated as the Appellee in the above entitled and numbered cause, and moves the Court that the judgment heretofore entered on the 10th day of January, 1955, reversing the judgment of the District Court, be vacated and set aside, and that the appeal of the Appellants to this

Court be dismissed for want of jurisdiction of the Court of Appeals to entertain, in this proceeding to set aside an order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, an appeal from the decision and judgment of the United States District Court.

The Points and Authorities supporting this Motion follow.

IRVING RAND
DONALD A. SCHAFER
Public Service Building
Portland 4, Oregon

GEORGE L. QUINN, JR.
Bowen Building
Washington 5, D. C.
Attorneys for The Martin Brothers Box Company

POINTS AND AUTHORITIES

The proceeding in the District Court of the United States for the District of Oregon by The Martin Brothers Box Company, Petitioner, against the United States of America and Interstate Commerce Commission, Defendants, consisted of a petition to the said District Court to enjoin and set aside an order of the Interstate Commerce Commission entered March 12, 1951, as without support in and contrary to law. This is shown in detail by the Amended Petition found in the transcript of record, pages 3 to 28, inclusive, by the Answer of the United States of America in the transcript pages 31 and 32, and the Answer of the Interstate Commerce Commission pages 28 to 31, inclusive.

Section 1291 of the United States Code, Judiciary and Judicial Procedure, (28 U.S.C.A. § 1291) provides that United States Courts of Appeal have jurisdiction of ap-

peals from decisions of the United States District Courts, *except where* a direct review may be had in the Supreme Court.

Section 1253 (28 U.S.C.A. § 1253) provides that except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting an injunction in any civil action or proceeding *required* by any Act of Congress *to be heard* and determined by a District *Court of three judges.*

The Chapter of the United States Code, Judiciary and Judicial Procedure, providing for judicial review of orders of the Interstate Commerce Commission, other than for the payment of money or the collection of fines, penalties and forfeitures, is Chapter 157, 28 U.S.C.A. §§ 2321 to 2361, inclusive.

Section 2321 provides that the procedure in proceedings to enjoin or set aside an order of the Commission shall be as provided in the Chapter. The next section provides that the proceedings shall be brought *by or against the United States,* and the next that the Commission may appear as a party of its own motion. Then Section 2325 provides that a permanent injunction restraining the enforcement of any order of the Commission *shall not be granted unless* the application is heard and determined by a District *Court of three Judges.*

It is apparent from a consideration of the foregoing (1) that the jurisdiction of the District Court to review the order of the Interstate Commerce Commission and to enjoin or set aside the order exists solely by Chapter 157 of the Judicial Code; (2) that Section 1253 (of this Chapter) provides for appeal to the Supreme Court from the order of the District Court enjoining or setting aside the order of the Commission; and (3) that under Section 1291 this Court of Appeals has no jurisdiction of this appeal since a direct review of the District Court order may be had in the Supreme Court.

The Supreme Court in United States vs. Interstate Commerce Commission, 337 U.S. 426, 69 S.C. 1410, has said that a petition to set aside an order of the Interstate Commerce Commission may be entertained by a one judge tribunal. But an opinion in this same case points out that review is not available under the general jurisdiction of the District Courts, 28 U.S.C.A. § 1337.

Furthermore the United States, the only necessary party under the statute, has not endeavored to appeal from the decision of the District Court, either to the United States Supreme Court or to the Court of Appeals.

The Martin Brothers Box Company has heretofore failed to challenge the jurisdiction of the Court of Appeals in a case such as this. It has petitioned the Supreme Court of the United States to review the judgment of the Court of Appeals by petition for writ of certiorari, which petition the Supreme Court has now denied. But it is well settled that a denial of a petition for writ of certiorari is not a determination that the court below had jurisdiction, and it is equally well settled that the lack of jurisdiction of a court is never waived, even though long neglected by counsel, and that if the court lacks jurisdiction its decision is necessarily void and may be shown to be void at any time in any stage of the proceedings.

It is respectfully submitted that the judgment heretofore entered should be vacated and these proceedings dismissed for want of jurisdiction of this Court.

Notice of Order Denying Motion to Dismiss Appeal

January 12, 1956

Office of the Clerk
U.S. Court of Appeals
For the Ninth Circuit
San Francisco 1, Calif.

Edward M. Reidy, Esq.
Chief Counsel
Interstate Commerce Commission
Washington, D. C.

Re: No. 14077

Interstate Commerce Commission and Southern Pacific Co., vs. Martin Brothers Box Company

Dear Mr. Reidy:

For your information in the matter, I beg to advise that the Court has this day entered an order denying the motion to dismiss appeal in above cause.

Very truly yours,

PAUL P. O'BRIEN,
Clerk

O'B:m
cc: All counsel.

Pertinent Text of Statutes Involved

Section 1253 (28 U.S.C. § 1253). Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Section 1291 (28 U.S.C. § 1291). The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Section 1336 (28 U.S.C. § 1336). Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Section 2321 (28 U.S.C. § 2321). The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

Section 2322 (28 U.S.C. § 2322). All actions specified in section 2321 of this title shall be brought by or against the United States.

Section 2323 (28 U.S.C. § 2323). The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commis-

sion, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirements or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

Section 2324 (28 U.S.C. § 2324). The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

Section 2325 (28 U.S.C. § 2325). An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Section 1 (1) (49 U.S.C.A. § 1). The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or . . .

(4) It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(11) It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

Section 3 (1) (49 U.S.C.A. § 3). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit, point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsover: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Certificate of Service

I hereby certify that I have this day served the foregoing Petition upon counsel for respondents by mailing by first class mail, postage fully prepaid, a copy thereof, to each of the following: The Solicitor General of the United States, Department of Justice, Washington 25, D. C.; Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C.; Edward M. Reidy, Transportation Building, Washington 6, D. C.; and by mailing a copy thereof, first class air mail, postage fully prepaid, to each of the following: William L. Harrison, Interstate Commerce Commission, 1056 Flood Building, San Francisco 2, California; James E. Lyons and Charles W. Burkett, Jr., 65 Market Street, San Francisco 5, California; James C. Dezendorf and George B. Campbell, 800 Pacific Building, Portland 4, Oregon.

Dated at Washington, D. C., this 2nd day of APRIL, 1956.

.....

GEORGE L. QUINN, JR.
Of Counsel for Petitioner

FILED
MAY 5 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 822

THE MARTIN BROTHERS BOX COMPANY, a corporation,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation,
Respondents.

Brief of Respondent Southern Pacific Company In Opposition to Petition for Writ of Certiorari

JAMES C. DEZENDORF
GEORGE B. CAMPBELL
800 Pacific Building
Portland 4, Oregon

JAMES E. LYONS
CHARLES W. BURKETT, JR.
65 Market Street
San Francisco 5, California

Counsel for Respondent, Southern Pacific Company.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

INDEX

	Page
Statement	1
Reply to "Question Presented"	2
Real Question for Decision	6
Summary of Reasons for Denying Writ	6
Argument	7
I. There are no special or important reasons for certiorari	7
II. The complaint before the District Court was properly heard and determined by a single judge, with the acquiescence of petitioner	8
III. Petitioner has no standing to attack jurisdicton of Court of Appeals or District Court	11
Conclusion	12

AUTHORITIES CITED

Cases	Pages
Davis v. Wakelee, 156 U. S. 680	7
Federal Reserve Bank v. Omaha N. Bank, 45 F.2d 511	8
Gore v. Bingaman, 20 C.2d 118, 124 P.2d 17	8
Layne etc. Corp. v. Western Well Works, Inc., 261 U. S. 387	7
Le Tulle v. Scofield, 308 U. S. 415	12
Martin Bros. Box Co. v. Interstate Commerce Commn., 350 U. S. 823, 350 U. S. 909	2, 7
Morley Constr. Co. v. Maryland Cas. Co., 300 U. S. 185	12
Peoria & P. U. Ry. v. United States, 263 U. S. 528	12
Thompson v. Maxwell etc. Co., 168 U. S. 451	8
United States v. Ellison, 74 F.2d 864	11
United States v. Interstate Commerce Commn., 337 U. S. 426	9, 10
Washington Bridge Co. v. Stewart, 44 U. S. (3 How.) *413	8

Statutes	
28 U. S. C.:	
Section 1253	9
Section 1291	8
Section 1336	9, 11
Section 2323	9, 12
Section 2325	9

Texts	
3 Am. Jur., Appeal & Error §§ 865-66, pp. 402-03	12
21 C. J. S., Courts § 109, p. 166	11

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 822

THE MARTIN BROTHERS BOX COMPANY, a corporation,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation,
Respondents.

Brief of Respondent Southern Pacific Company In Opposition to Petition for Writ of Certiorari

STATEMENT

This is the third time that this case has been pressed upon this overburdened Court by the petitioner, Martin Brothers Box Company: (1) In No. 85, Oct. Term, 1955, petitioner sought a writ of certiorari to review the decision of the Court of Appeals, 219 F.2d 811, which reversed the single-judge judgment of the Oregon District Court, 128 F. Supp. 919, holding that the trial court erroneously concluded that the evidence was insufficient to sustain the findings and conclusions of the Interstate Commerce Commis-

sion in 280 I.C.C. 395. That petition was denied by the Supreme Court on October 10, 1955 (350 U.S. 823). (2) Petitioner on November 3, 1955, filed in this Court a motion to set aside the order of October 10, 1955, denying writ of certiorari, and contemporaneously filed with the Court of Appeals for the Ninth Circuit a motion to vacate and set aside the opinion and order entered by that court on January 10, 1955, and to dismiss the appeal. Both of these motions were based upon the contention—here renewed—that this was a statutory three-judge case in the District Court, mistakenly heard and decided by a single judge, and, therefore, the Court of Appeals lacked jurisdiction under 28 U.S.C. § 1253, providing for direct appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any act of Congress to be heard or determined by a district court of three judges. This Court denied the motion by order of December 5, 1955; and the Court of Appeals, after hearing the parties on oral argument and considering written points and authorities, entered an order (without opinion) on January 12, 1956, denying the motion to dismiss the appeal (Appendix to Petition, p. 29a). (3) The presentation of the instant petition for certiorari to review the latest order of the Court of Appeals makes the third time this case has been pressed upon this honorable Court.

REPLY TO "QUESTION PRESENTED"

We cannot accept petitioner's "Question Presented," as set forth on page 2 of the petition, and accordingly set forth our own presentation thereof.

Petitioner unqualifiedly states that the decision and judgment of the District Court was one "to enjoin and set aside an order of the Interstate Commerce Commission, which order was made by the District Court for other than the payment of money or the collection of fines." This statement is erroneous, for the proceedings before the Commission, the District Court, the Court of Appeals, and previously before the Supreme Court on the first petition for certiorari in this case, concerned the order of the Commission which denied petitioner an award of reparation. While it is true that petitioner's complaint to the Commission initially sought relief in addition to money damages, petitioner later abandoned all aspects of its complaint other than that relating to money damages for transactions occurring during period January 1 to September 30, 1947. When the case came on for hearing before the Commission, the presiding examiner stated the issue as relating solely to reparation during the stated period (R., pp. 130-31).[1] This statement of the issues was then accepted by the parties as those to be determined, and the examiner's proposed report consequently made no mention of future relief (R., p. 84). No exceptions were filed by petitioner to this omission. Therefore, the report of the Commission concerned itself only with the issue of damages raised by the complaint and stated the relief sought in the following language: "An award of reparation is sought" (R., p. 108).

In its amended petition in the District Court, petitioner summarized in paragraphs 6 to 10 the proceedings before the Commission, and with respect to the examiner's proposed report stated:

---

1. All references marked "R." are to the Transcript of Record filed with petitioner's prior Petition No. 85, Oct. Term, 1955.

"• • • To this report the petitioner filed with the Commission 2 exceptions contending that the amount of reparation to which petitioner was entitled should be found to be at least $205,606.94, and otherwise accepting the said report proposed by the Examiner in full." (R., p. 10)

In its brief before the Court of Appeals petitioner gave its explanation at page 5 thereof for its abandonment of the issues in the complaint before the Commission, other than those relating to money damages, in the following language:

"• • • By the time the matter came on to be heard before an Examiner Martin's Oakland plant was no longer being deprived of necessary cars by Southern Pacific. There remained the question of reparations for the damages caused during the complaint period, from January 1, 1947, to September 30, 1947, by the failure of Southern Pacific Company to furnish adequate transportation."

At page 26 of the transcript of September 7, 1954, oral argument before the Court of Appeals, counsel for petitioner conceded, indeed even urged, the following delineation of what was involved in the appeal:

"Mr. Rand: I think the record shows the only matter before the examiner for hearing at the time that the hearing was conducted in 1950 was the question of reparations and the examiner's statement of issue made at the commencement of the hearing is in the record and was accepted by all parties as the issues then to be determined at that hearing."

So that there might not be any misunderstanding of the scope of the hearing, counsel for petitioner made this concession four times. The following quotations are from page 27 of the oral argument transcript:

"Mr. Rand: Well, as I say, the only issue before the—the only issue that remained after the filing of the petition and after the filing of the answer and to the time of the hearing before the examiner was the question of the damages for the period up to the first day of October, 1947. * * *

"Judge Healy: I think the Court fully understands the only period involved here is the nine-months period prior to filing the petition.

"Mr. Rand: That's right. * * *

"Mr. Rand: There is no—there is no issue, if Your Honor please, as to any—in this case or there wasn't before the Commission, the examiner—the Commission, or the district court, and there isn't before this Court any issue as to any necessity for action on the part of the Commission to compel the Southern Pacific Company to furnish transportation to the Martin Brothers Box Company at the Oakland plant. That issue which was a part of the petition before the Commission is out of the case. I don't know whether that is an adequate explanation of Your Honor's question or not but at least that's the position of the parties at the present time."

It would be difficult to make the issue any clearer; and the District Court, in reviewing the order of the Commission, rightly restricted itself to the reparations issue. (R., pp. 42-43.) The Court of Appeals, at petitioner's insistence, similarly restricted its consideration to the sole issue of money damages. (Record before this Court, Vol. IV, p. 848; 219 F.2d 811). Notwithstanding these indisputable facts and representations, petitioner is now attempting—without even an explanation—to belatedly shift its position by misstating to this Court the nature of the issue finally presented to the Commission and considered by the two courts below.

The various grounds asserted before this Court by petitioner on the motion to vacate the previous denial of certio-

rari in No. 85 Oct. Term, 1955, are indistinguishable from the objections raised by petitioner in the instant petition, and call for similar disposition.

THE REAL QUESTION FOR DECISION

The principal question presented for decision, correctly stated, is as follows: Do the provisions of 28 U.S.C. § 1291 authorize the courts of appeal to review the final decision of the single-judge District Court in this action? A secondary procedural question incidentally arises, and it is: May petitioner raise the jurisdictional question under the circumstances?

We shall undertake to show that the answers to these inquiries are yes and no, respectively, and that no sound reasons exist for granting the writ.

SUMMARY OF REASONS FOR DENYING THE WRIT

1. A review on writ of certiorari is not a matter of right and will be granted only where there are special and important reasons therefor. Rule 18, Sup. Ct. Rules. No such reasons have been shown. Prior rulings of Supreme Court govern instant petition.

2. The complaint was properly heard and determined in the District Court by a single judge, and with the acquiescence of petitioner.

3. Petitioner, not being an appellant, and raising no question as to the jurisdiction of the District Court or Court of Appeals until after denial by this Court of its first petition in No. 85, Oct. Term, 1955, has no standing to attack the jurisdiction of the Court of Appeals, and thus directly or indirectly challenge the propriety of the single-judge decision of the District Court which it seeks to sustain.

ARGUMENT

I. There are no special or important reasons for certiorari.

Jurisdiction to grant certiorari is not conferred upon the Supreme Court merely to get the defeated party in the Court of Appeals another hearing. It is granted, first, to secure uniformity of decision between those courts in the ten circuits and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by the court of last resort. *Layne etc. Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). No good reason has been shown why petitioner herein should have two opportunities to present to this busy Court the same question in the same case. Rule 19 of the Supreme Court Rules of Practice expressly states that a review on certiorari "will be granted only where there are special and important reasons therefor." No such reasons have been shown.

Furthermore, a showing of good cause may not be predicated upon an inconsistent position, such as that adopted by petitioner herein. See *Davis v. Wakelee*, 156 U.S. 680 (1895), where, at page 689, it was stated by this Court:

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

Petitioner is bound by the previous rulings of this Court, on both the denial of its first petition, and the motion made to vacate the denial thereof for want of jurisdiction of the Court of Appeals (350 U.S. 909). This Court will not reconsider the same question on a second appeal by the same party. This is so, even though it be contended that absence of jurisdiction of the trial court and Court of Appeals ren-

ders the decision on the first petition nugatory and ineffective as a determination. See *Washington Bridge Co. v. Stewart*, 44 U.S. (3 How.) *413, *417 (1845); *Thompson v. Maxwell etc. Co.*, 168 U.S. 451, 456 (1897); *Federal Reserve Bank v. Omaha N. Bank*, 45 F.2d 511, 514 (8th Cir. 1930), and cases cited; and *Gore v. Bingaman*, 20 C.2d 118, 121 (1942), 124 P.2d 17, 19.

II. The complaint before the District Court was properly heard and determined by a single judge, with the acquiescence of petitioner.

In the foregoing "Statement" we pointed out that by the time the case came before the Commission examiner for hearing petitioner abandoned all aspects of its case other than those relating to money damages for transactions taking place during the 9-month period from January to September, 1947, and on page 4 we quoted the statement of counsel to the effect that by the time the matter came on for hearing the car shortage was over. At that time, the question of reparations or damages during the period covered by the limited complaint was the only thing that remained for consideration and decision. It is, therefore, obvious and inescapable that what was heard by the Commission involved only issues respecting money damages, a characterization of petitioner's case which petitioner itself urged at each step in the progress of the case through the courts until after the adverse ruling of this Court on its petition for certiorari in No. 85, Oct. Term, 1955. Then, for the first time, it urged that the Court of Appeals had no jurisdiction.

28 U.S.C. § 1291 (1948 ed.) provides that the courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States except where a direct review may be had in the Supreme Court. Direct

appeals to the Supreme Court in cases of this character are expressly limited by section 1253 of the same title to appeals from orders granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding "required by any Act of Congress to be heard and determined by a district court of three judges." The trial of this case before the District Court was not required to be heard and determined by a court of three judges. 28 U.S.C. § 1336 vests general jurisdiction in the district courts "of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission." This section vested the trial court with general jurisdiction. It is true that section 2325 of the same title provides that an interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Commission "shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title," but this honorable Court specifically held in *United States v. Interstate Commerce Commn.*, 337 U.S. 426, 443 (1949), that an order of the Commission denying reparations is not of sufficient importance to justify the use of the three-judge court procedure, and that the trial of such a case should be conducted before a single judge. In the complaint there filed during World War II (Apr. 15, 1944) by the United States, the Commission was asked to require the defendants either to perform for the future the handling incident to shipside receipt and delivery of traffic at certain Army base piers in Norfolk, Va., or to pay the Army an allowance therefor, and to pay reparation on past shipments handled by it over those piers. See 263 I.C.C. 303, 304 (1945). But when the final report of the Commission on reargument was issued,

two years later, the war was over and it appeared that the issue of future relief had become moot, "so that the purpose of this proceeding now is for reparation only" (269 I.C.C. 141, 147 (1947)). In this Court's cited opinion, those proceedings were characterized thus: "• • • the root of the controversy concerns the payment of money damages • • •." (337 U.S. at 443) It is obvious that the facts of the instant case find a direct parallel in the proceedings before the Court in *United States v. Interstate Commerce Commn., supra,* and are governed thereby. This was recognized by the trial judge, who stated:

> "On the authority of United States v. Interstate Commerce Commission, 1949, 337 U.S. 426, 69 S.Ct. 1410, 93 L.Ed. 1451, the request of plaintiff for a 3-judge court was denied • • •." (128 F. Supp. 919, 921)

Indeed this was the view at that time of petitioner, which, at page 5 of its first petition for certiorari in No. 85, Oct. Term, 1955, stated:

> "For a one judge determination rather than a three judge District Court, and appeal to the Court of Appeals rather than this Court, see U. S. vs. I.C.C., 337 U.S. 426, 441."

Therefore, we respectfully submit that the trial court, the Court of Appeals and the Supreme Court all properly concluded that the single-judge District Court had jurisdiction to hear and decide the case. If, perchance, it be true that a three-judge court should have heard and decided the complaint, which we deny for reasons already set forth, petitioner is no better off because there is no question but that the District Court had general jurisdiction, and whether the procedure followed was correct in all particulars is now immaterial. Any right which petitioner may have had with

respect to the number of judges was waived by its failure to make timely objection and in acquiescing in the procedure actually followed.

While we agree that absolute want of jurisdiction of the subject-matter by the District Court may not be waived or conferred by consent (Petitioner's Memo, p. 28a), nevertheless where—as here—the court has general jurisdiction of the subject-matter, jurisdiction of the particular case will be waived by failure to take timely and specific objections and submission to the jurisdiction raises an estoppel to deny such jurisdiction. 21 C.J.S., *Courts* § 109, p. 166, states the rule as follows:

> "• • • Where the court has general jurisdiction of the subject matter, a lack of jurisdiction of the particular case, as dependent upon the existence of particular facts may be waived," citing, among other cases,
>
> *United States v. Ellison*, 74 F.2d 864, 869 (4th Cir. 1935), *cert. denied*, 295 U.S. 750.

In the interest of brevity, we refer to, and adopt as a part of this reply, the reply of Southern Pacific Company to the motion, etc., in No. 85, Oct. Term, 1955.

III. Petitioner has no standing to attack jurisdiction of Court of Appeals or District Court.

Petitioner, not being an appellant and raising no question as to the jurisdiction of the District Court or Court of Appeals until after denial by this Court of its first petition for certiorari in No. 85, Oct. Term, 1955, has no standing to attack the jurisdiction of the Court of Appeals, or to thus directly or indirectly challenge the validity of the single-judge decision of the District Court, which it claims is void, but actually seeks to sustain. The District Court did have general jurisdiction under 28 U.S.C. § 1336, leaving only the question of fact as to whether one or three judges should

hear the complaint. This was and is a procedural question, which was resolved against petitioner by the trial court, and any irregularity in this respect could only be raised at the outset by mandamus or appeal, or it will be treated as waived. It is a rule of universal application that parties not appealing are not entitled to question a ruling of the lower court.

Le Tulle v. Scofield, 308 U.S. 415, 421-22 (1940), and cases cited in footnote 9, p. 422;

Peoria & P. U. Ry. v. United States, 263 U.S. 528, 536 (1924);

Morley Constr. Co. v. Maryland Cas. Co., 300 U.S. 185, 191-92 (1937);

3 Am. Jur., *Appeal & Error* §§ 865-66, pp. 402-03.

In its points and authorities, page 28a, petitioner states:

> "Furthermore the United States, the only necessary party under the statute, has not endeavored to appeal from the decision of the District Court, either to the United States Supreme Court or to the Court of Appeals."

The significance of that statement is not apparent to us because 28 U.S.C. § 2323 expressly provides for intervention "as of right" by the Interstate Commerce Commission "and any party or parties in interest to the proceeding before the Commission * * * who may prosecute, defend, or continue said action or proceeding unaffected by the action or non-action of the Attorney General therein."

CONCLUSION

The sole foundation for this second petition is the repudiation by petitioner of a position which it had heretofore urged upon the Commission, the trial court, the Court of

Appeals and upon the Supreme Court when this case was first brought before it. There it no substance to the claim which petitioner seeks to raise, for clearly both the trial court and the Court of Appeals had statutory jurisdiction. For these and other reasons heretofore presented, the petition should be denied.

Dated at San Francisco, Calif., this 1st day of May, 1956.

Respectfully submitted,

JAMES C. DEZENDORF
GEORGE B. CAMPBELL
JAMES E. LYONS
CHARLES W. BURKETT, JR.

Counsel for Respondent,
Southern Pacific
Company.

Certificate of Service

I, JAMES E. LYONS, one of counsel for respondent Southern Pacific Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of May, 1956, I served copies of the foregoing brief on the parties to this proceeding, as follows:

1. On petitioner, by mailing copies in duly addressed envelopes, with air mail postage fully prepaid, to its attorneys of record, as follows:

George L. Quinn, Jr., Esq.,
815 - 15th Street, N.W.,
Washington 5, D.C.

Irving Rand, Esq., and
Donald A. Schafer, Esq.,
Public Service Building,
Portland 4, Oregon.

2. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage thereon fully prepaid, to

The Solicitor General,
Department of Justice,
Washington 25, D.C.

3. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with air mail postage thereon fully prepaid, to

Robert Ginnane, Esq.,
Chief Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

JAMES E. LYONS

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 822

THE MARTIN BROTHERS BOX COMPANY, A CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND SOUTHERN PACIFIC COMPANY, A CORPORATION, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT INTERSTATE COMMERCE COMMISSION IN OPPOSITION

QUESTION PRESENTED

Whether a decision of a District Court, which held only that the Interstate Commerce Commission erred in denying a claim for reparations, is appealable to the appropriate Court of Appeals or directly to this Court.

STATEMENT

This is a repetition of the contention of petitioner, Martin Brothers Box Company, that the

Court of Appeals for the Ninth Circuit lacked jurisdiction over an appeal from the judgment of the District Court for the District of Oregon, consisting of a single judge, which was adverse to petitioner, 128 F. Supp. 919.

In No. 85, October Term, 1955, Martin petitioned this Court for a writ of certiorari to review the decision of the Court of Appeals (219 F. 2d 811), which petition was denied on October 10, 1955, 350 U. S. 823. On November 3, 1955, he filed a motion with this Court requesting that the order of October 10, 1955, denying writ of certiorari, be set aside. The motion was denied on December 5, 1955 (No. 85, October Term, 1955). Simultaneously with the filing of the motion in this Court, petitioner filed with the Court of Appeals, Ninth Circuit, a motion to vacate its judgment and to dismiss the appeals of the Commission and the Southern Pacific to that Court on the ground that it lacked jurisdiction to entertain the appeal from the judgment of the District Court.

The motions filed in the Court of Appeals and in this Court were predicated on the contention that the complaint filed in the District Court should have been heard and determined by a statutory three-judge court, instead of a one-judge District Court. Hence, it is contended the Court of Appeals lacked jurisdiction to hear the

appeal under Section 1253 of Title 28 U. S. C.[1] The instant petition is based on the same contentions as those advanced and rejected in the two aforementioned motions.

ARGUMENT

1. Petitioner would have this Court believe, as revealed by its "Question Presented" (Petition, p. 2) that the decision and judgment of the District Court, setting aside the order of the Commission, was concerned with issues "other than the payment of money." This statement conveys an erroneous impression. A review of the proceedings before the Commission and the courts below clearly shows that the sole relief sought by the petitioner was an award of reparation.

Moreover, the issues as stated by the Examiner at the beginning of the hearing before the Commission was as follows (R. 130–131):

> Exam. HANSON. By complaint filed October 14, 1947, Complainant alleges that during the period January 1 to September 30, 1947, Defendant failed to provide Complainant with transportation from Oak-

[1] Section 1253, Title 28 U. S. C., provides that:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926."

land, Oregon, upon reasonable request therefor, and caused undue prejudice to Complainant by failing to provide car service from Complainant's plant in Oakland in the same proportion to actual requirements as was provided other shippers on Defendant's line. An award of damages is requested.

Is that a correct summary of the complaint?

Mr. QUINN. I think it is, yes.

Exam. HANSON. Complainants may proceed.

The proposed report of the Examiner (R. 84–106) was concerned only with reparations and not with relief for the future. No exception was taken to the Examiner's report because of that circumstance. The report of the Commission, by Division 3, dealt only with reparation.

In its brief filed in the Court of Appeals from the decision of the District Court (No. 14077, dated May 12, 1954), petitioner stated, at page 4, that:

> * * * During 1947, the difficulties in obtaining cars became so aggravated that on October 14, 1947, Martin filed with the Interstate Commerce Commission a complaint demanding, among other things, that Southern Pacific Company be required by order of the Commission to furnish to Martin adequate transportation. *By the time the matter came on to be heard before an Examiner Martin's Oakland*

> *plant was no longer being deprived of necessary cars by Southern Pacific. There remained the question of reparations for the damages caused during the complaint period, from January 1, 1947, to September 30, 1947, by the failure of Southern Pacific Company to furnish adequate transportation.* * * * [Emphasis added.]

As shown from the above, although petitioner's complaint in the Commission proceeding sought an order "commanding the defendant to provide complainant with adequate car service" in addition to reparations (R. 80–81), all relief sought was abandoned except that for reparation covering alleged failure of the Southern Pacific to deliver cars during the period from January 1, to September 30, 1947.

2. It is clear that the Court of Appeals had jurisdiction to review the judgment of the District Court, since the case involved only the grant or denial of reparations by the Commission. In *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, 443, this Court held the judicial review of a Commission order denying reparation shall be in a single-judge District Court and that an appeal from the judgment of such a court should be taken to the appropriate Court of Appeals, rather than to this Court. Thereafter, jurisdiction to review a similar judgment of a one-judge District Court was exercised by the Court of Appeals for the District of Co-

lumbia in *United States* v. *Interstate Commerce Commission*, 198 F. 2d 958 (certiorari denied 344 U. S. 893). It is clear, therefore, that the Court of Appeals for the Ninth Circuit had jurisdiction to hear and determine the appeal in the instant case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel,

SAMUEL R. HOWELL,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

MAY 1956.

CERTIFICATE OF SERVICE

I, Samuel R. Howell, one of counsel for respondent Interstate Commerce Commission, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of May 1956, I served copies of the foregoing brief on the parties to this proceeding as follows:

1. On petitioner, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to its attorneys of record, as follows:

George L. Quinn, Jr., Esq.
815 15th Street, N. W.
Washington 5, D. C.

and with air-mail postage prepaid, to:

Irving Rand, Esq., and
Donald A. Schafer, Esq.
Public Service Building
Portland 4, Oregon

2. On the Southern Pacific Company by mailing copies in duly addressed envelope, with air-mail postage prepaid, to its attorneys of record, as follows:

James E. Lyons, Esq.
Charles W. Burkett, Jr., Esq.
65 Market Street
San Francisco 5, California

3. On the United States of America, by mailing copies in duly addressed envelope with first-class postage prepaid, to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

SAMUEL R. HOWELL.

U. S. GOVERNMENT PRINTING OFFICE: 1956